

Under the Retailers' Occupation Tax Act, the manufacturing machinery and equipment exemption is available for machinery and equipment used primarily (over 50% of the time) in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease. See 86 Ill. Adm. Code 130.330. (This is a GIL).

June 21, 2000

Dear Xxxxx:

This letter is in response to your letter dated March 8, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

I am writing at the suggestion of Mr. George Diaz of the Problem Resolution Division of the Illinois Department of Revenue in Chicago. This firm represents an STATE corporation which is a distributor of heavy manufacturing equipment. Specifically, such equipment is heavy manufacturing machinery used by manufacturers of concrete, cement and cement based products to manufacture such products for the ultimate end user. Our client's customers would be known in the industry as 'Ready Mix Plants', which produce products for sale to contractors and other wholesalers. As such, it is our understanding that the sale of such equipment used in manufacturing is exempt from sales/use tax in Illinois.

Due to changes in its method of operation, and requirements imposed by a product line it established in 1999, sufficient nexus now exists to establish that our client is now transacting business in the State of Illinois. Accordingly, we are in the process of assisting in establishing them as a registered foreign corporation in Illinois and, further, in filing income taxes in Illinois on the apportioned income it receives from business in 1999 and forward. I would appreciate your opinion as to the requirement of our client registering for the collection and payment of sales taxes for sales in Illinois, and further, whether or not such manufacturing products are taxable. Obviously, in the event that its products are subject to sales tax, we will need to (i) confirm that the customers have not paid Illinois use tax, (ii) registered to pay such taxes to Illinois, and (iii) collect and remit such taxes to Illinois for 1999. In the event such products are not subject to sale taxes, I would appreciate your opinion as to whether our client would, (i) still need to register with Illinois for collection of sales tax, and (ii) file zero returns showing no tax due.

June 21, 2000

Thank you for your attention to this matter. If you have additional questions, please do not hesitate to contact me at #####.

Under the Retailers' Occupation Tax Act, the manufacturing machinery and equipment exemption is available for machinery and equipment used primarily (over 50% of the time) in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease. See 86 Ill. Adm. Code 130.330, enclosed. The exemption also extends to repair and replacement parts as long as the parts are incorporated into machinery and equipment that is exempt under the regulation.

"Manufacturing" is defined as the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by procedures commonly regarded as manufacturing, which changes some existing material or materials into a material with a different use, form, or name. These changes must result from the process in question and be substantial and significant.

The mixing of cement by ready-mix trucks is considered to be the manufacturing of cement. Van's Material Company, Inc. v. Department of Revenue, 131 Ill. 2d 196, 545 N.E.2d 695 (1989). Repair and replacement parts, such as tires, tubes and wheels, incorporated into the ready mix concrete trucks would be exempt. In order to document the exemption, the user of such machinery and equipment must supply an exemption certificate to the retailer as provided in 86 Ill. Adm. Code 130.330(g).

In regards to ready-mix trucks and equipment used in ready mix plants please note, however, that the manufacturing exemption cannot be claimed on such equipment unless it is used primarily in the manufacture of tangible personal property to be sold at retail. If the equipment is primarily used to manufacture cement that the ready mix company uses in performing construction contracts, the exemption will not apply. In this case, the company is considered a construction contractor and a user of the cement it produces, rather than a retailer of cement.

In the context of a General Information Letter or Private Letter Ruling, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether your client is responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers. You have indicated in your letter that your

client "does not store inventory, occupy offices, have a server, or staff employees within" Illinois. If your client does not accept purchase orders in Illinois or maintain an inventory in Illinois and fill Illinois orders from that inventory, your client is not an Illinois retailer.

A "retailer maintaining a place of business in Illinois," as defined in 86 Ill. Adm. Code 150.201(i), enclosed, is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The Retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability. Determining whether a retailer is maintaining a place of business in Illinois is extremely fact specific. The Department cannot make such a complex ruling with the type of limited information that is provided in requests for General Information Letters or Private Letter Rulings.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

Retailers making all exempt sales often register with the Department as resellers. By registering as resellers, they obtain reseller numbers which provide them with the wherewithal to provide their suppliers with Certificates of Resale for the property which they will subsequently resell. Once registered, such retailers are not required to file returns unless they begin making retail sales subject to tax. Enclosed please find an Illinois Business Registration Packet.

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I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk

Enc.